JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 331

AARON L. SIMON,

Petitioner,

against

MAURICE WEINGOLD, Public Administrator, as Administrator of the Goods, Chattels and Credits of MARTIN VAN WYCK, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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AUTHORITIES CITED

Barron & Holtzoff, Federal Practice and Procedure, Sec. 1559, p. 90 14

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review three orders of the United States Court of Appeals for the Second Circuit, as follows: (a) Order dated and entered April 10, 1967, which denied appellant's motion for an extension of time in which to docket his appeal; (b) Order dated and entered April 10, 1967, which granted appellee's motion to dismiss the appeal; and (c) Order dated and entered June 12, 1967, which denied appellant's motion to reinstate his appeal.

Opinions Below

No opinions were written by the Court of Appeals in determining said motions.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

Questions Presented

1. Did the Court of Appeals abuse its discretion, or did it actually decline to exercise any judicial discretion, in making its determination that no substantial question for appeal existed in the case?

2. Did the Court of Appeals apply the procedures provided for in Rule 73 of the Federal Rules of Civil Procedure and in Rule 14 (c) of the Rules of the Court of Appeals for the Second Circuit?

3. Did the several determinations of the Court of Appeals deny due process of law to the appellant?

4. Did said determinations deny equal protection of the laws to the appellant?

5. Did the appeal present a substantial question; and did the Court of Appeals commit error in failing to discern that a substantial question was indeed presented?

6. Are the several determinations of the Court of Appeals in conflict with decisions of the Supreme Court,

the Courts of Appeals of other Circuits, and prior decisions of the Court of Appeals of the Second Circuit?

7. Did the Court of Appeals depart from the accepted and usual course of judicial proceedings so as to call upon the Supreme Court for the exercise of its power of supervision?

Statutes Involved

Rule 73 of the Federal Rules of Civil Procedure, Title 28 U. S. C.

(a) How and When Taken. An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of judgment appealed from • • •

• • •

Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

• • •

(g) Docketing the Appeal; Filing of the Record on Appeal. The appellant shall cause the record on appeal as provided for in Rules 75 and 76 to be filed with the court of appeals and the appeal to be docketed there within 40 days from the date of filing the notice of appeal. The record will be filed and the appeal docketed upon receipt by the clerk of the court of appeals, within the 40 days herein

provided or within such shorter or longer period as the court may prescribe, of the record on appeal and, unless the appellant is authorized to proceed without prepayment of fees, of the docket fee fixed by the Judicial Conference of the United States. When more than one appeal is taken from the same judgment to the same court of appeals, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court may extend the time for filing the record and docketing the appeal upon motion of an appellant made within the period for filing and docketing as originally prescribed or as extended by a previous order, or upon its own motion by order entered within such period; but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal. The motion of an appellant for an extension shall show that his inability to effect timely filing and docketing is due to causes beyond his control or to circumstances which may be deemed excusable neglect. The district court or the court of appeals may require the record to be filed and the appeal to be docketed at any time within the time otherwise provided or fixed.

Rules of the Court of Appeals for the Second Circuit, 28 U. S. C.

14. Docketing cases—(a) Time within which record must be filed. In appeals in civil and admiralty cases the appellant shall docket the action and file the record in this court within 40 days after filing the notice of appeal with the district court, or within any added time granted by the district judge within 40 days after the filing of the notice of appeal, but in no case later than 90 days after such filing (Rule 73 (g) of the Federal Rules of Civil

Procedure (c. 15 of this volume)). In an appeal in a criminal case the appellant shall docket the case and file the record within the time fixed by Rule 39 of the Federal Rules of Criminal Procedure (c. 2 of this volume). If the record is not presented to the clerk for filing within the periods above provided, he shall refuse to accept it unless so ordered by this court or a judge thereof if this court is not in session, or an order on consent has been or is being entered as provided in Rule 29 (9).

(b) Motion to file record. This court will not hear and grant motions for filing and docketing appeals, otherwise properly taken, at times other than as stated in subdivision (a) hereof, except upon a showing by affidavits, or otherwise as the court may order, (1) that the delay has been due to causes beyond the control of the moving party, or (2) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal, and (3) in all cases where the district court has power to act, that an extension of time has been denied by that court, together with the grounds for such denial, if any are stated.

(c) Dismissal by the clerk. If the appellant shall have failed to comply with this rule, any appellee may either docket the action and file the record in this court, in which event it shall stand for argument, or have the action dismissed by the clerk of this court upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, certifying that such appeal has been duly taken or allowed, and proof that 4 days' notice in writing has been served on the appellant or his attorney that application will be made to the clerk of this court for such dismissal. No action dismissed under this rule shall

be reinstated except in the discretion of the court and upon a showing similar to that required under subdivision (b) hereof.

Statement of the Case

On January 19, 1967, appellant filed a notice of appeal from a judgment entered on December 21, 1966, in the United States District Court for the Eastern District of New York. Said judgment dismissed the complaint based on personal injuries received in an automobile accident, following a trial without a jury. Pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, the appeal should have been docketed within 40 days, that is on or before February 28, 1967. Appellant failed to docket the appeal within the prescribed time.

On March 28, 1967, appellant moved in the Court of Appeals for the Second Circuit for an order which would extend his time for docketing until April 19, 1967, a date just 90 days after filing the notice of appeal. On April 3, 1967, the appellee moved for an order which would dismiss the appeal on the ground that he had not been served with a proposed case. Appellee's motion was in violation of Rule 14 (c) of the Rules of the Court of Appeals for two reasons:

(a) Whereas said Rule directs that a motion to dismiss for failure to docket shall be made before the Clerk, appellant addressed his motion to the Court; and

(b) Said Rule provides that when the appellee dockets the appeal, "it shall stand for argument". Prior to the return day of the two motions, appellee docketed the appeal and paid the required filing fee. The effect of such docket-

ing, implicit in the Court's Rule, was to cure appellant's delay in docketing the appeal.

Appellant's motion for a time extension and appellee's motion to dismiss were both argued on April 10, 1967. Appellant's motion was denied and the appeal was dismissed in two orders dated April 10, 1967. In reporting the Court's decision from the bench, the Chief Judge stated that the rulings were made because the appeal lacked merit. Presumably the excuse presented for the delay in docketing was deemed sufficient.

In respect of such delay, the appellant's motion showed the following facts. The notice of appeal had been served on January 19, 1967, by Seymour C. Hartman, Esq., the attorney who tried the case. However, it was not until February 21, 1967, that Irving L. Weinberger, Esq., was retained to conduct the appeal. Soon thereafter the court reporter was contacted, but he required an advance payment before proceeding to transcribe his minutes. Counsel wrote to the appellant and asked him to send his check to the reporter. Unfortunately the appellant, Dr. Simon, was away in Puerto Rico and delay ensued in his making the requested payment. On March 17, 1967, the appellant mailed his check to the reporter. The reporter, then informed counsel that the minutes would be ready on approximately April 15, 1967. On March 23, 1967, counsel prepared the Record in the District Court and the Clerk promptly transmitted same, less the minutes, to the Court of Appeals. On March 28, 1967, the appellant moved in the Court of Appeals for an extension of time to docket the complete Record.

In respect of the merits of the appeal and the substantial question involved, the moving affidavit stated the following:

> "The principal issue in the appeal is that the cross-examination of the plaintiff on collateral is-

sues went far beyond the proper scope so as to deny the plaintiff a fair trial".

In the course of the argument, appellant's counsel informed the Court that the cross-examination related to appellant's conviction of a crime thirty years before the accident.

On April 18, 1967, appellant applied for reconsideration to the Court which had heard the argument. The supporting affidavit provided more elaborate detail in respect of the merits of the appeal and the substantiality of the question. Said motion for reconsideration was denied in an order dated and entered on April 20, 1967.

On April 24, 1967, appellant applied for reconsideration to the Court en banc. Appellant contended that the determination of the motions was at variance with the Court's liberal policy of relieving an appellant of default where the neglect is excusable and the appeal contains a substantial question. Said application was denied in an order dated and entered on May 9, 1967.

On May 29, 1967, appellant moved for an order, pursuant to Rule 14 (c) of the Rules of the Court of Appeals for the Second Circuit, which would reinstate the appeal. Said motion was denied in an order dated and entered June 12, 1967. In respect of excusable neglect, the moving affidavit repeated the reasons for delay substantially as related above, with the following additions:

> "I made the decision to defer the motion for an enlargement of time for docketing until I would be able to show the Court that the appeal was being prosecuted actively."

And:

> "Even if the appeal had been docketed within the prescribed time, it could not have been processed so

as to be heard before the summer recess. Accordingly, no possible prejudice could result to the appellee".

In respect of the substantiality of the question, the moving affidavit made a more complete showing of the facts than had been presented in the original motion for a time extension. It was pointed out that the appellant, Dr. Simon, is now an elderly practicing physician in New Jersey. Many years ago, after having become a doctor, the appellant switched to the legal profession and achieved success at the negligence bar. Suddenly his legal career terminated in a judgment of conviction based upon impropriety with a jury, followed by imprisonment and disbarment.

Approximately thirty years thereafter, on March 30, 1963, Dr. Simon was injured in an automobile accident. He then instituted the instant lawsuit for personal injuries. Following a trial without a jury his complaint was dismissed on the ground of contributory negligence. Appellant claimed that error was committed on the trial because of the unwarranted cross-examination of the appellant in respect of his criminal conduct, which subjected him to humiliation and degradation, and which deprived him of a fair trial.

Defendant was permitted to inquire not only about the conviction, but also about the punishment; and also about additional criminal conduct at an earlier date, in respect of which there was no conviction. The plaintiff's rights as a human being were debased, whether or not there was a jury present. Moreover, the result reached by the trial judge establishes that he rejected the plaintiff's testimony on the sole ground that he was unworthy of belief.

Dr. Simon's version of the accident was that there was a car ahead of him stopped for a red light at the intersection.

He slowed down and came to a full stop behind said car. A minute later, the defendant's car hit him in the rear and propelled him into the car in front. Defendant contended that there was no car ahead; but that at a distance of some 75 feet before the intersection, the plaintiff was distracted by some article on the front seat and bent over to pick it up. Then, without signal or warning, the plaintiff forcefully applied his brakes and came to a sudden stop. The driver of the defendant's car then applied his brakes and skidded into the plaintiff's car.

Having adopted the theory that there never was any car stopped at the intersection in front of the plaintiff's vehicle, defendant presumed that he would have little difficulty in proving it. After all, the only evidence of the presence of a car ahead would have to come from the plaintiff. Thereupon the defendant's objective became the destruction of the plaintiff as a witness and a man, so that nothing the plaintiff had to say in connection with the accident would be worthy of belief.

The trial court found that plaintiff's car had not been propelled into another vehicle. Said finding was made in spite of the fact that plaintiff's version of the accident was sustained by the highest quality of professional testimony. An eminent medical specialist testified, without contradiction, that the only manner in which the physical injury could have occurred was by a sudden propulsion forward, followed by an instantaneous stopping upon impact against the car ahead. Ironically enough, the trial judge stated that he accepted the plaintiff's medical proof.

Defendant's counsel was forthright in his announcement to the Court that the defense would be a personal attack upon the plaintiff. He stated:

> "In other words, the diagnosis made, the claim as to what occurred, when it occurred, and how it

occurred, and what were the results are based primarily upon this witness' credibility".

Thus, the presence or absence of an automobile ahead would be proved by criminal acts which had occurred thirty years earlier. In developing such proof, defendant was not satisfied to establish the conviction alone. That was only the starting point in his cross-examination.

Said cross-examination violated the rule that for impeachment purposes it is improper to show accusation, arrest or indictment (*Hockaday* v. *Red Line, Inc.* (D. C. Cir., 1949, 174 F. 2d 154, 155)). The cross-examination in the instant case shows the following:

"Q. How about back in the 1920's were you convicted of a crime? A. 1920? Yes. That's an examination that I made, and they said that examination was—another insurance company that did it——

Q. Well, were you convicted of a crime? A. I was acquitted. I was never convicted. I was acquitted. It was set aside".

Going back to the '20's was no mere error. Defendant knew that if there had been a conviction in the '20's, plaintiff would not have been trying cases as a lawyer in the '30's.

In *Hockaday* v. *Red Line, Inc.* (*supra*, 174 F. 2d 154) the defendant brought out that the plaintiff in a negligence action had been convicted of a crime. But the defendant did not stop there. He showed that the plaintiff had received a suspended sentence which was revoked because he failed to enter military service. The Court directed a reversal on the authority of *Lee Kwong Nom* v. *United States* (Sec. Cir., 1927, 20 F. 2d 470) where the Court stated:

"The length of his imprisonment was immaterial; he was sufficiently impeached, and his credibility attacked, by the question and answer which brought forth the admission of his conviction".

In violation of said rule, the cross-examination in the instant case developed the following:

"Q. Did you receive a sentence? A. Yes. Oh, yes.

Q. Did you serve a sentence? A. Certainly.

Q. You served a sentence. A. Despite the fact the medical board said they ignored it.

Q. Where were you confined, Doctor? A. In State Prison in Trenton.

Q. And that was on—for how long a period were you confined? A. Three years, one on each".

Each of three crimes charged in the indictments was described in detail. The indictments themselves were received in evidence. This was permitted even though the plaintiff had never denied such conviction.

In determining unsubstantiality the Court of Appeals laid great emphasis on the fact that the case was tried by a court only. It is manifest, however, that the finding of the trial judge reflected a rejection of the plaintiff's testimony and medical evidence, based ostensibly on the factor of credibility.

The rules of evidence which exclude the cross-examination which was conducted in this case, were not intended to apply only in a case tried before a jury. The prejudicial matter which was received in the trial of this case did not become admissible because no jury was present. III Wigmore on Evidence Sec. 983, p. 551, points out that there are two reasons which underlie the exclusionary

rule. The first is plain decency and the second is public policy. Thus (p. 551):

> "The second reason is a politic one, i.e. that with the prospect of such an examination as a possibility, the public is certain to dread the witness box. From time to time those whose knowledge would have been valuable will seek to evade disclosing it; the ascertainment of the truth will be hampered and perhaps prevented. That such a feeling exists in a greater or less degree, can hardly be doubted".

See also: Renzo D. Bowers "The Judicial Discretion of Trial Courts", p. 487; *Third Great Western Turnpike Co.* v. *Loomis,* 332 N. Y. 127; *State* v. *Hull,* 52 W. Va. 296, 43 S. E. 160.

Reasons for Granting the Writ

There are important reasons why the Writ of Certiorari should be granted in this case:

1. The several determinations of the Court of Appeals have denied the appellant due process of law. The Court initially granted a motion to dismiss which had been brought on in violation of the Court's Rule 14. Said Rule also gave to the appellant an absolute right to move for reinstatement of his appeal following dismissal. On such motion, the appellant had the right to be heard. The determination of the motion to reinstate, when measured against the presentation of fact and law submitted in support of said motion, compels the conclusion that the Court of Appeals gave no judicial consideration to the motion and made no legal evaluation of the substantiality of the question presented therein. The proper exercise of judicial discretion required the Court to hear said motion and not to deny it out of hand. The obligation to accord said

motion a proper hearing was mandated both by Rule 73 F. R. C. P. and Rule 14 of the Court's own Rules. Moreover, the Court should have acknowledged the irregularity of the prior proceedings in the matter; and, out of concern for the integrity of its own orders, should have addressed itself to correct same.

2. The several determinations of the Court of Appeals have also denied the appellant equal protection of the laws. If an appeal possessing inherit merit can be dismissed, and remain dismissed, only because of a short delay in docketing, which has been sufficiently explained, then the rule for timely docketing is converted by judicial fiat into a jurisdictional requirement. Said determinations offend against the provision in Rule 73 (a) F. R. C. P. that the failure to perfect the appeal expeditiously does not affect the validity of the appeal. It has been held that such delay is not jurisdictional (*Phillips* v. *Employers' Mutual Liability Insurance Co. of Wisconsin*, Fifth Cir., 1956, 239 F. 2d 79; Barron & Holtzoff, *Federal Practice and Procedure*, Sec. 1559, p. 90). If a proper judicial discretion is in fact exercised in determining whether an appeal should be dismissed under Rule 73, it may be presumed that the meritorious causes will be permitted to proceed and that those lacking in substance will be doomed. However, if no discretion is exercised, or if it is abused, then an appellant's rights are left to pure chance and the judicial process becomes unequal and discriminatory.

3. The Court of Appeals erred in determining that the appeal lacked substance. Appellant raised the issue of whether the plaintiff had received a fair trial when he was subjected to a merciless cross-examination in respect of a conviction which occurred thirty years before the accident, an examination which was permitted to proceed beyond

all proper limits as defined by the authorities, and which clearly influenced the trial court's determination on the facts and the law. If this had been a criminal case, the Court of Appeals, in conformity with the recent rulings of the Supreme Court, would have immediately perceived that the issue called for judicial review. It is submitted that litigants in a civil action are also entitled to a fair trial and to judicial review of a judgment which emanates from a prejudicial trial.

4. The several determinations of the Court of Appeals are in conflict with the decision of the Supreme Court in *Pyramid Freight Corporation* v. *Ispass,* 330 U. S. 695, 67 S. Ct. 954. While this Court there affirmed the action of the Court of Appeals as authorized under Rule 73 F. R. C. P., it also pointed out that the procedure was in conformity with the Rule of the Court of Appeals.

5. The several determinations of the Court of Appeals are in conflict with determinations reached by the Courts of other Circuits (*Mikhelson* v. *Yonng Men's Christian Association,* Sev. Cir., 1963, 317 F. 2d 78; *Phillips* v. *Employers' Mutual Liability Ins. Co. of Wisconsin,* Fifth Cir., 1956, 239 F. 2d 79; *Perry* v. *United States,* Ninth Cir., 1955, 225 F. 2d 724; *Stumpf* v. *Matthews,* D. C. Cir., 1951, 195 F. 2d 25; *Mutual Benefit Health & Accident Assn.* v. *Snyder,* Sixth Cir., 1940, 109 F. 2d 469.

6. The several determinations of the Court of Appeals are in conflict with said Court's prior decisions. In *Mosier* v. *Federal Reserve Bank of New York,* 1942, 132 F. 2d 710, the appellant failed to docket his Record for three years following filing of the notice of appeal. While remarking that such delay was extraordinary and unexplained, the Court denied a motion to dismiss and heard

the appeal on the merits. In *Pyramid Motor Freight Corporation* v. *Ispass,* 1945, 152 F. 2d 619, mod. 330 U. S. 695, where the appellant delayed four months before applying for a time extension, the Court stated:

> "In the case at bar there was no abuse of discretion in extending the time, despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment."

7. The several determinations of the Court of Appeals represent a deviation from a previously established policy of liberality in the granting of time extensions so that a meritorious appeal might proceed despite delay. Practitioners at the New York bar have proceeded in reliance upon such liberal policy, which now has ostensibly been abandoned. In all fairness to the attorneys who practice in said Court, the Court of Appeals should have announced its new policy either by writing an appropriate decision or by amending Rule 14. A majority of said practitioners also conduct appeals in the Appellate Division, First Department, of the New York Supreme Court. In 1964, the Appellate Division served notice upon the bar that it would employ a sterner rule where there was delay in perfecting an appeal (*Tonkonogy* v. *Jaffin,* 21 A. D. 2d 264, 249 N. Y. S. 2d 934). Even despite said warning, appeals in said court are rarely dismissed unconditionally; an appellant is granted an opportunity to perfect his appeal on or before a fixed date. The practitioners at the federal bar are continuing under a misapprehension that an equivalent liberal policy still prevails in the Second Circuit. Changing the rules, without providing due notice, constitutes unfairness and a violation of due process.

8. This is not just another accident case. The plaintiff here has been denied his right to an appeal which called for a review of questions that fundamentally affect the right of a litigant to a fair trial. The Court of Appeals either failed to apprehend that such questions existed in the case, or, what is more probable, failed to give any judicial consideration to appellant's demonstration thereof. The dismissal of this appeal concerns not only the plaintiff in the instant case, but all litigants who may be denied substantial rights by a process that is arbitrary and capricious, rather than an administration of due process of law. It is submitted that the circumstances call upon the Supreme Court to exercise its power of supervision to the end that justice may be effected in the instant case and in the many cases that will be heard in the Second Circuit.

It is therefore respectfully urged that the orders of the United States Court of Appeals for the Second Circuit should be reversed, and to that end the Writ prayed for herein should issue.

Respectfully submitted,

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